Supreme Court, U.S.
FILED
20
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

82-744

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

JOHN P. MacARTHUR
Attorney for Appellant
284 State Street
Albany, New York 12210

October 18, 1982

QUESTIONS PRESENTED

May a state deny a petitioner judicial hearing and review of a claim that her constitutional rights were violated by an order of an administrative board, particularly where that order required that petitioner expend substantial sums of money to alter her real property?

May a town zoning board of appeals act upon the petition of a neighbor, filed after the expiration of the time limit provided by statute and after the completion of construction, upon the deciding vote of another neighbor who is also a member of the board, to require a property owner to demolish a fence recently constructed pursuant to a town permit?

SUBJECT INDEX

	Page
Table of Cases	iii
Table of Statutes	v
Other Authorities	v
Introduction	1
Opinion Below	2
Jurisdiction	3
A. Statement	3
B. Order	4
C. Jurisdiction of Appeal	5
D. Authorities Supporting Jurisdiction	5
Statutes Involved	6
Questions Presented	6
Statement of the Case	8
A. The Parties	8
B. How the Federal Questions are Presented	8
C. How they were Passed Upon	9
D. The Facts	9
Argument	14
A. The Statutes at Issue	14
B. The Due Process Questions Presented are Substantial	15
1) Persons affected	15
2) The situation presented here is novel	18
Conclusion	26
Appendices	
A-1 Order of the New York State Court of Appeals	27
A-2 Decision and Order Appealed From	29

SUBJECT INDEX

		Page
A-3	Order and Opinion of the Court Below	38
B	The Constitution of the United States, Amendment 14, Section 1	52
C-1	New York State Civil Practice Law and Rules, Article 78	53
C-2	Zoning Law, Town of Niskayuna, Sections 8.6.3 and 11.5	58
D	Notice of Appeal to the Supreme Court of the United States	60
Certificate of Service		65

TABLE OF CASES

	Page
American Surety Co. v. Baldwin, 287 U.S. 156, 77 L.Ed. 231, 53 S.Ct. 98	20
Baltimore & O.R. Co. v. United States, 298 U.S. 349, 80 L.Ed. 1209, 56 S.Ct. 797	21
Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697	19
Diamond National Corp. v. State Board of Equalization, 425 U.S. 268	5
Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011	21
Iron Cliffs Co. v. Negaunee, Iron Co., 197 U.S. 463, 49 L.Ed. 836, 25 S.Ct. 474	19
Jones v. Securities and Exch. Comm., 298 U.S. 1, 80 L.Ed. 1015, 56 S.Ct. 654	25
Lawrence v. State Tax Commission, 286 U.S. 276	5
Lindsey v. Normet, 405 U.S. 56, 31 L.Ed.2d 36, 92 S.Ct. 862	20,21

TABLE OF CASES

	Page
Live Oak Ass'n v. Railroad Commission, 269 U.S. 354	5
Mergenthaler Linotype Co. v. Davis, 251 U.S. 256	5
Nebraska Press Asso. v. Stuart, 427 U.S. 539, 49 L.Ed.2d 683,96 S.Ct. 2791	20
Parratt v. Taylor, 68 L.Ed.2d 420, 101 S.Ct. 1908	19
Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163	20
Virginia v. Imperial Coal Sales Co., 293 U.S. 15	5
Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456	20-21

TABLE OF STATUTES

	Page
U.S. Const. amend. XIV, §1	3; 6; App. B
The Civil Practice Law and Rules of the State of New York	6, App. C-1
Zoning Law of the Town of Niskayuna, New York	6, App. C-2

OTHER AUTHORITIES

16A AmJur 2d, Due Process of Law, §§804, et seq.	22

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

INTRODUCTION

Appellant appeals from the Order of the New York State Court of Appeals entered on July 23, 1982, denying Appellant's motion for leave to appeal to that Court from an Order of the

Appellate Division of the Supreme Court, Third Judicial Department, entered on April 28, 1982, which Order affirmed an Order of the Supreme Court of the State of New York in and for the County of Schenectady, New York, directing Appellant to remove certain fences on her premises, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The New York State Court of Appeals wrote no opinion. The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported at 87 A.D.2d 932 (3d Dept., 1982). The opinion of the Supreme Court of the

State of New York is not reported. Copies of the opinion and the Orders of the three New York State Courts are attached hereto as Appendices A-1 through A-3.

JURISDICTION

A. Statement

This proceeding was brought pursuant to N.Y. Civ. P.L.R. §7801 (the relevant portion is attached hereto as Appendix B-1), seeking review of an Order of Appellees directing Appellant to remove certain fences on her premises, on the ground that this Order violated Appellant's rights under the "due process" provisions of U.S. Const. amend. XIV, §1, and was thus unconstitutional and void. It is brought to this Court on the

ground that to deny Appellant the right to judicial review of that question was itself a violation of Appellant's due process rights, as well as on the original ground.

B. Order

The order of the New York State Supreme Court, Schenectady County, was entered on December 8, 1980; Notice of Appeal was filed on January 5, 1981, to the Appellate Division of the Supreme Court of the State of New York, the Order of which court was entered on April 28, 1982; leave to appeal therefrom was sought by motion to the New York State Court of Appeals; that court's order denying the motion was entered on July 23, 1982. Notice of Appeal was filed in the Appellate Division and the New York State Supreme Court on August 18, 1982.

C. Jurisdiction of Appeal

The jurisdiction of the Court to review this decision by direct appeal in conferred by 28 U.S.C. §1257(2).

D. Authorities Supporting Jurisdiction

The following decisions sustain the jurisdiction of the Supreme Court to review the order on appeal in this case:

Lawrence v. State Tax Commission, 286 U.S. 276

Live Oak Ass'n v. Railroad Commission, 269 U.S. 354

Virginia v. Imperial Coal Sales Co., 293 U.S. 15

Diamond National Corp. v. State Board of Equalization, 425 U.S. 268

Mergenthaler Linotype Co. v. Davis, 251 U.S. 256

STATUTES INVOLVED

Copies of portions of the Civil Practice Law and Rules of the State of New York and of the Zoning Law of the Town of Niskayuna, New York, are attached hereto as Appendices C-1 and C-2, but the principal statute involved is the "due process" portion of Section 1 of the 14th Amendment to the Constitution of the United States, attached as Appendix B.

STATEMENT OF THE CASE

A. The Parties

Appellant owns a residence in the Town of Niskayuna, Schenectady County, New York. Appellees are the Niskayuna Zoning Board of Appeals. There appear to be no disputed questions of fact. At issue are the validity of portions of the local zoning ordinance and the state statute governing judicial review of administrative orders.

B. How the Federal Questions Are Presented

The federal questions sought to be reviewed in connection with the zoning ordinance were raised in the petition in the court of first instance. Those relating to the state statute governing review were raised on appeal to the first appellate level. They were briefed by the parties and urged

in oral argument, but not explicitly considered by the court in its opinion.

No new questions are raised here.

C. How They Were Passed Upon

By implication, the constitutiional questions were decided in favor of Appellees, whose order was affirmed.

D. The Facts

Appellant, who owns a residence in the Town of Niskayuna, New York, filed (with the local building inspector) an application for a permit to fence her back yard; the appropriate fee therefor was paid; a permit was issued; and the fence was constructed pursuant thereto. The local zoning ordinance provides for review of the issuance of a permit "within thirty days". More than thirty days after the fence was completed, several months after the permit was issued, a neighbor

sought review before the local Board, Appellee herein.

The Board met three times. After the first it ordered removal of the top two feet of fence; another neighbor who sits on the Board participated in the discussion but abstained from voting. After the second, the matter was adjourned. After the third, the Board (by a one-vote margin) ordered removal of the rest of the fence, the swing vote being that of the previously abstaining neighbor. The ground upon which removal was ordered was that the local law permitted only two "accessory structures", which were already on the premises; that the fence constituted an additional "accessory structure"; and that the permit had therefore been improvidently granted.

Pursuant to New York State

statute, Appellant sought judicial review of those orders on a number of grounds, including impropriety of the voting, laches, the statute of limitations, the misapplication of the designation "accessory structure" to a fence, and other grounds, alleging deprivation of property in violation of the "due process" clauses of the State and Federal constitutions. The Court heard argument in chambers on the statute of limitatations question, heard no other questions either in chambers or in open court, and sustained the Board's order. Appeal to the New York State Appellate Division resulted in affirmance, and permission to appeal to the Court of Appeals was denied.

The notion of a review of record of the proceedings below is itself

misleading; there is no "record", in the usual sense, because there was no "proceeding". No witness was ever sworn, no hearing was held. It was simply a matter of glossing over a little local illegality and corruption, to the benefit of several people and the detriment of only one, precisely what occurs whenever an undesireable citizen is incarcerated through illegal procedure, except that (thanks largely to this Court) it has become legitimate to question the unconstitutional acts of a sovereign in criminal cases. This is not a criminal case; but it has already fostered, and will continue to foster, a spreading decay in the local judicial process. None of the foregoing facts are disputed.

The result is that Appellant, having expended several thousand

dollars to construct a fence pursuant to a permit is now ordered to demolish it at her own additional cost, as the result of a late-brought proceeding, a vote by a public officer interested in the outcome, and no judicial review of any of the constitutional or other questions raised. The various statutes and ordinance involved are typical of those which apply not only across the State of New York, but throughout the nation. The amount of money damage in this one case is relatively small, but the invasion of right is great and the potential application of this proceeding to other cases is incalculable.

Appellees have never taken issue with any of this. They argue only that the interested neighbor, as a duly appointed member of the Board, had a

right to vote on any question brought before it; that there was no statutory right to a hearing on questions of law; and that the questions of fact were not dispositive of the issue anyway. By this theory, of course, the entire appellate function of this Court, and all others of appellate jurisdiction, becomes a trivial act of sovereign grace, and not a matter of right at all.

ARGUMENT

A. The Statutes at Issue

At issue is the validity of a New York State statute which has to do with review of administrative decisions, replacing the old writs of certiorari and mandamus. According to its terms, an aggrieved party is entitled to a "hearing" (the word is used several times; see Appendix C-1); as

interpreted, however, an aggrieved party is permitted to present neither witnesses nor other evidence with respect to disputed questions of fact, and is permitted neither oral argument nor the submission of briefs or memoranda on disputed questions of law.

To the extent that this result may be said to flow from the provision of the rules adopted by, and governing the practice of, the Zoning Board of Appeals of the Town of Niskayuna, New York, to the effect that its decisions are final and binding, the validity of that rule is also here at issue (see Appendix C-2).

B. The Due Process Questions are Substantial

1) Persons affected.

The statute at issue governs judicial review of administrative decisions of every kind within the

State of New York. Such review is sought in thousands of instances each year, both by natural persons and by corporations and other enterprises, and the rights of all such petitioners are directly affected by the decision herein. The amount of money involved in the totality of such proceedings is incalculable.

Of perhaps greater importance, although it is difficult to measure the extent thereof, is the impact of this decision in other jurisdictions. Substantially every jurisdiction in the country -- local state and federal alike -- provides in its rules and statutes for judicial review of administrative decisions. For a number of reasons, principally relating to the fact that the State of New York is regarded as a sophisticated

jurisdiction, the procedural rules of which have been particularly carefully drafted, New York is often looked to as a model by other states and political subdivisions in the preparation of their own statutes. Indeed, the statutes of many jurisdictions in this regard are essentially identical.

Thus, although the question here presented directly affects only persons and enterprises resident i he State of New York, it indirectly affects every citizen of the United States.

The special problem presented here is that because the law is so clearly and obviously against Appellees, it is tempting to conclude that the case is a freak; that no other court would ever follow it; that therefore the only person who will in fact be irreparably injured is Appellant; and that this

Court has more important things to do than to safeguard the rights of a single person, no matter how grossly they have been violated. To this view it can only be responded that, freak or no, it has been produced in the face of an apparently reasonable statute by the courts of a major state; that lower courts are bound to accept it as authority; and that it is a part of the business of the law to protect the fundamental rights of persons against patent outrage by their own governments.

2) The situation presented here is novel

The effect of the decision herein is particularly broad and important because it is novel. Prior authority exists with respect to situations involving no review at all, or broad review of both questions of fact and law, but Appellant has been unable to

find a single case in which questions of both law and fact were presented and review was limited to in-chambers argument on a single point, the statute of limitations.

An opportunity for a hearing by an impartial tribunal is an essential element of due process; Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 49 L.Ed. 836, 25 S.Ct. 474; Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697; Parratt v. Taylor, 68 L.Ed.2d 420, 101 S.Ct. 1908. There was no such opportunity afforded Appellant before the Zoning Board of Appeals, where the decision turned upon the vote of an interested and partial neighbor and was grounded upon a series of erroneous assumptions of law and fact which Appellant had no opportunity to contest or rebut.

There was no such opportunity afforded Appellant before the Court, which allowed no testimony, other evidence or argument upon questions of fact and no evidence or argument upon any questions of law except for one: the timeliness of the commencement of the proceeding before the Board.

Appellant has a constitutional right to present her defenses; Lindsey v. Normet, 405 U.S. 56, 31 L.Ed.2d 36, 92 S.Ct. 862; American Surety Co. v. Baldwin, 287 U.S. 156, 77 L.Ed. 231, 53 S.Ct. 98. Indeed, her objection to the vote cast by the interested member of the Board (itself a violation of her constitutional rights; Nebraska Press Asso. v. Stuart, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791; Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163; Withrow v. Larkin, 421

U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456, particularly where the interest was large and pecuniary; Withrow v. Larkin, supra, which did not occur until after the Board proceedings were concluded) could not be presented anywhere but to the reviewing Court; there was no other possible forum, a situation envisaged in Lindsey v. Normet, supra., p. 20.

Appellant had a constitutional right to introduce evidence; Baltimore O.R. Co. v. United States, and to judicial findings thereon; Id. This was a case of not even allowing an opportunity for such a proffer to be made, oral or written. There was no opportunity to confront or cross examine witnesses; Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011, or even to argue questions of law explicitly raised by the pleadings.

Of the various legal encyclopedias (e.g. 16A AmJur 2d, Due Process of Law, §§804 et seq., esp. §839, 841, 843), which collect authorities on the questions here presented from the various jurisdictions, not a single authority to the contrary of the positions urged by Appellant herein can be found. So far as Appellant has been able to determine from all other sources, none exist anywhere. The requirement of a hearing is universal. The requirement that it be before a disinterested tribunal is universal. The requirement that it be broad enough in scope to permit an aggrieved party to present and have considered all legitimate factual and legal defenses is universal. Only in this case is the opposite view adopted.

And this is much more obvious than simply taking Appellant's land without a hearing. Appellant is further required to expend her own funds to an unspecified extent to facilitate this taking. The Town is not paying for this process; it is requiring Appellant to do so, and has instituted contempt proceedings to enforce its will.

If this were a proceeding in the nature of eminent domain, or one to require abatement of a nuisance, or one involving the invocation of a sovereign's emergency power, it would at least be arguable that a legitimate sovereign interest was involved. But no such elements are involved here. This is a case of a neighbor, on a claim that a fence reduced property values in a neighborhood, and that

the permit to construct it was thus improvidently granted, ruling in an official capacity that it must be demolished at the builder's expense, and whatever else that may imply it does not imply a legitimate sovereign interest. This is not even a "negative order"; it is an affirmative one, of unlimited extent.

This is not a question of trial de novo; one cannot try anew that which was never tried in a first trial. This does not involve "substantial evidence", "credible" evidence, a "residuum" of evidence, "competent" evidence or any "evidence" at all.

It is not a question of discretion, or propriety, or wisdom, or judgment, or reasonableness. It is not only a question of whether the Order was right or wrong in any ultimate

philosophical sense, but also a question of how it was engendered.

This is simply a case of a person forcing his neighbor to expend money to his own financial benefit by causing a board upon which he sits to issue such an order. That is not a government of law; it is an intolerable government of persons, acting in official capacities to further personal ends; Jones v. Securities and Exch. Comm., 298 U.S. 1, 80 L.Ed. 1015, 56 S.Ct. 654.

CONCLUSION

For all of these reasons, it is respectfully urged that the questions presented here are substantial and of public importance.

Respectfully submitted,

JOHN P. MacARTHUR
Attorney for Appellant
284 State Street
Albany, New York 12210